(1) Supreme Court, U.S.

No. 01 499 SEP 18 2001

In the

Supreme Court of the United States

ROBERT BROWN,

Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does the Railway Labor Act preclude the exercise of federal jurisdiction over claims under the Americans With Disabilities Act?

(2) Where an employer is alleged to have violated the Americans With Disabilities Act by failing to provide a reasonable accommodation, may the employer defeat that claim by asserting that the requested accommodation would violate its seniority rules?

PARTIES

The parties to this action are set forth in the caption.

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OPINIONS BELOW

The June 20, 2001 opinion of the court of appeals, which is reported at 254 F.3d 654 (7th Cir. 2001), is set out at pp. 1-26 of the Appendix. The April 18, 2000 memorandum opinion of the district court, which is reported at 2000 WL 420855 (N.D. Ill.), is set out at pp. 27-40 of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on June 20, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 45 U.S.C. § 151a (Railway Labor Act) provides in pertinent part:

> The purposes of the chapter are: . . . (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Title 45 U.S.C. § 153(i) (Railway Labor Act) provides:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases

> pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

Title 45 U.S.C. § 157 (Railway Labor Act) provides:

> Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.

Title 42 U.S.C. § 12117(a) (Americans with Disabilities Act) provides:

> The powers, remedies, and procedures set forth in sections 705, 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be

> the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under section 106, concerning employment.

STATEMENT OF THE CASE

From 1979 until 1996 petitioner Robert Brown was a trainman employed by respondent Illinois Central Railroad Company ("the Railroad"). The terms of his employment were governed by a collective bargaining agreement ("CBA") between the Railroad and the United Transportation Union ("the Union"). Brown served as a "guaranteed extra board" ("GEB") trainman.

GEB trainmen do not have fixed jobs; they fill in for absent workers, or are used for unexpected surges in work. GEB trainmen are paid for every day they are on the "call board" and available for work, even if they are not given a job. At least since 1995 GEB trainmen have not had fixed rest days. Instead, the CBA guarantees GEB trainmen "reasonable layoffs", meaning a reasonable number of days when they do not have to be on the board and available for work, although the CBA does not specify the meaning of "reasonable." Although the Railroad contends that it requires GEB employees to be "available" for work seven days a week, 24 hours a day, it does not suggest it could actually require them to work that much; federal hours of service law limit the number of hours railroad workers can be on the job, and the CBA requires a "reasonable" amount of time when GEB trainmen do not have to be available for work. (App. 3, 29-30).

At some point during his employment, Brown was diagnosed as having schizoaffective disorder. He was first hospitalized for this condition in 1988. Brown can do most GEB trainmen jobs despite his condition. He cannot, however, work seven days in a row because of the stress involved, and requires one or two days a week of rest. (App. 4, 30).

Prior to June 1995 Brown had a GEB trainman job with two guaranteed rest days a week. When that position was abolished, Brown would routinely "lay off" two days a week. For approximately one year the Railroad made no objection to this practice. (App. 4).

In 1996, however, Brown's supervisor insisted that he be "available" for work seven days a week. Although the Railroad could not legally require Brown to actually work 365 days a year, the supervisor evidently intended to reduce the number of lay off days Brown would take. Brown, in response, gave the supervisor a note from his physician restricting him to working a maximum of five days a week due to his disorder.[1] The Railroad promptly "medically disqualified" Brown from employment; Brown has not worked for the Railroad since that disqualification. (App. 5, 31). The Union urged the Railroad to accommodate Brown and permit him to lay off a sufficient number of days to deal with his medical condition. When the Railroad refused, the Union pursued a labor grievance on his behalf, contending that his disqualification had violated the reasonable accommodation requirement

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[1] Two physicians, one retained by Brown and one retained by the Railroad, subsequently agreed that, at least with medical monitoring, Brown could work as many as six days in seven, but not seven days in a row.

of the Americans with Disabilities Act ("ADA".) Under the Railway Labor Act ("RLA") grievances are resolved by the Public Law Board. The Railroad argued, and the Public Law Board agreed, that the Board had no authority to enforce claims under the ADA. (App. 5).

While this grievance was pending, Brown also filed suit in federal district court under the ADA. He alleged that he was qualified to work as a GEB trainman with the reasonable accommodation of being allowed to lay off an average of two days a week. The Railroad moved to dismiss the complaint on a number of grounds. Although rejecting most of the Railroad's arguments, the district court dismissed the complaint on the ground that the RLA precluded Brown from bringing his ADA claim in federal court.

The court of appeals affirmed. Its decision relied on sections 151a and 153(i) of the RLA, which require resolution under the RLA mechanisms of disputes that "gro[w] out of grievances or out of the interpretation or application of agreements covering . . . working conditions." Such disputes are known as "minor disputes" under the RLA. (App. 7). Brown's claim itself arose out of the ADA, not the CBA. But the Seventh Circuit held that the RLA also bars judicial enforcement of statutory claims if the resolution of such claims would involve a dispute about the meaning of a CBA.

In this case the Seventh Circuit believed there was such a dispute. The company asserted that if it permitted Brown to lay off two days a week, that might amount to the creation of an entirely new position, known under the CBA as a "new run". A provision of the CBA requires that a "new run" be assigned on the basis of seniority. If permitting Brown to lay off two days a week constituted

a new run, the Railroad suggested, then that accommodation would in effect assign the new position to Brown without opening it up for bidding. (App. 11-13). Both Brown and the Union itself disagreed with that contention, insisting to the contrary that accommodating Brown would not violate the CBA. (App. 5, 11 n. 5). The President of the Union local submitted an affidavit explaining that "there is no specific provision in the CBA that would be violated by the accommodation requested by Robert Brown."[2]

The court of appeals did not conclude that the requested accommodation would actually violate the CBA. Rather, it held that under the RLA no court had the authority to resolve any dispute about the meaning of a CBA. Because the Seventh Circuit believed that resolving that dispute was necessary to determine the merits of Brown's ADA case, and because the court of appeals insisted that federal courts had no authority to resolve such disputes, it concluded that there was no way to decide the merits of that ADA claim at all. It therefore ruled that the RLA precluded judicial enforcement of the ADA.

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[2] Affidavit of Andrew W. Robuck, ¶ 16.

REASONS FOR GRANTING THE WRIT

Thirty-eight years ago this Court unanimously rejected the contention that the Railway Labor Act (RLA) preempts state legislation forbidding employment discrimination.

> There is [no] reason to say that Congress, in passing the Railway Labor Act . . . intended to bar States from protecting employees against racial discrimination. No provision in the Act even mentions discrimination in hiring. . . . Nothing in the Railway Labor Act or in our cases suggests that the Act places upon [a] carrier a duty to engage only in fair nondiscriminatory hiring practices. The Act has never been used for the purpose, and we cannot hold it bars Colorado's Anti-Discrimination Act.

Colorado Anti-Discrimination Comm'n v. Continental Airlines, 372 U.S. 714, 724 (1963).

The decision of the Seventh Circuit in the instant case holds that the Railway Labor Act in many cases precludes enforcement of an important federal anti-discrimination guarantee, the Americans With Disabilities Act. Although the reasoning of the Seventh Circuit is somewhat different from that rejected in *Colorado Anti-Discrimination Commission*, the result is all too similar.

In *Colorado Anti-Discrimination Commission* the Colorado lower court had asserted that the RLA preempted the entire field of employment relations at railroads and air carriers, precluding the states themselves from forbidding employment discrimination. 372 U.S. at 717. In the instant case the Seventh Circuit held that here, as in many other cases, the RLA stripped the courts of juris-

diction to enforce the ADA. There is little practical difference, however, between the decision below and the Colorado state court decision overturned in *Colorado Anti-Discrimination Commission*. The Seventh Circuit did *not* suggest that a railroad or airline employee aggrieved by a violation of the ADA could or should instead enforce that statute under the RLA procedures. To the contrary, the Public Law Board created under the RLA had already held at the behest of the Railroad that the ADA cannot be enforced under the RLA remedial mechanisms, a conclusion which the Seventh Circuit did not question. Against that background the court of appeals' holding that the ADA also could not be enforced in the federal courts meant that the statute was entirely unenforceable.

The Seventh Circuit's remarkable conclusion rested on two premises. First, the court of appeals held that an employer can defeat a reasonable accommodation claim under the ADA by asserting a seniority policy which would be inconsistent with that requested accommodation. (App. 10). The correctness of that holding, which rested on an earlier Seventh Circuit decision in *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996), is currently before this Court in *US Airways, Inc. v. Barnett*, No. 00-1250.

Second, the Seventh Circuit held that the mere assertion of the defense recognized by *Eckles* was fatal to an ADA claim against a railroad or air carrier, regardless of whether or not the accommodation requested actually conflicted with a seniority requirement, so long as the claimed rule was purportedly contained in a collective bargaining agreement. Federal courts, the Seventh Circuit insisted, could never interpret a collective bargain-

ing agreement subject to the Railway Labor Act, and thus could never resolve the merits of this asserted defense. Since, however, the underlying ADA claim was itself not cognizable in an RLA proceeding, it was also impossible to litigate in an RLA proceeding the validity of an asserted *Eckles* defense.

I. THIS CASE PRESENTS A LONGSTANDING CONFLICT BETWEEN THE STANDARDS FOR PRECLUSION AND FOR PREEMPTION UNDER THE RAILWAY LABOR ACT.

This case marks the inevitable collision of two conflicting lines of cases regarding the Railway Labor Act. For years the circuit courts have applied an avowedly narrow standard in determining when the RLA precludes application of another federal law; until the instant decision they had consistently rejected arguments that the RLA precludes judicial enforcement of *federal* civil rights statutes. At the same time, however, the courts of appeals have applied a quite different and far broader standard in holding that the RLA frequently preempts *state* laws, including state anti-discrimination statutes. In the instant case the Seventh Circuit, insisting that the standard for preclusion and for preemption should be the same, has fashioned a new intermediate standard that conflicts with both lines of cases.

(1) Until the instant decision, the courts of appeals have consistently rejected arguments that RLA-based preclusion bars enforcement against railroads and airlines of federal anti-discrimination laws. These decisions have repeatedly adopted and applied legal standards under which an ADA claim would never be precluded because of the RLA.

In *Bates v. Long Island R.R. Co.*, 997 F.2d 1028 (2d Cir. 1993), the Second Circuit held that RLA preclusion is never applicable to a federal civil rights claim. In refusing to apply preclusion to a claim under the Rehabilitation Act, that court explained:

> LIRR contends that because [plaintiffs'] claims require interpretation of the applicable collective bargaining agreement, they are "minor disputes" under the RLA. . . . While it is true that [plaintiffs'] discriminatory discharge claims may implicate . . . portions of their collective bargaining agreements, . . . it is not true that their exclusive remedy for their allegedly wrongful discharges is arbitration. . . . When an employee's statutory civil rights have been violated, arbitration should not be the sole avenue of protection, unless Congress has so specified. . . . *Alexander v. Gardner-Denver*, 415 U.S. 36 . . . (1974).

997 F.2d at 1034. The Second Circuit also relied on *Alexander v. Gardner-Denver* in rejecting a preclusion objection to a claim under 42 U.S.C. § 1983. *Coppinger v. Metro-North Commuter R.R.*, 861 F.2d 33, 36 (2d Cir. 1988).

In *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1115 (8th Cir. 1995), the Eighth Circuit held that preclusion was unwarranted where a federal statute, rather than the CBA, was the *source* of the right asserted by a plaintiff. "By bringing a claim under the ADA, . . . Benson seeks to enforce a federal statutory right, not a contractual right embodied by the collective bargaining agreement." In *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431, 439 (8th Cir. 1998), that circuit rejected an RLA-preclusion challenge to a claim under the Preg-

nancy Discrimination Act, "[b]ecause federal . . . law [is] the source of the claims, not the collective bargaining agreement." In *Norman v. Missouri Pacific R.R.*, 414 F.2d 73 (8th Cir. 1969), the court rejected arguments that the Railway Labor Act precluded claims against the employer under Title VII. "These are statutory rights, not contractual rights embodied in collective bargaining agreements." 414 F.3d at 83.

The Ninth Circuit as well has concluded that the RLA does not preclude claims under Title VII. "There is no doubt that Title VII rights, which the CBA never expressly references, 'exist independent of the collective bargaining agreement.' *Hawaiian Airlines [v. Norris*, 512 U.S. 246 (1994)]. . . . The RLA does not preclude litigation of Title VII rights." *Felt v. Atchison, T.&S.F.Ry. Co.*, 60 F.3d 1416, 1419-20 (9th Cir. 1995). The Ninth Circuit expressly rejected the railroad's argument that RLA preclusion should be applied "because its defense to Felt's charge . . . is based on a contractual right." 60 F.3d at 1420. That court of appeals reached the same conclusion with regard to the ADA. "As with Title VII rights, the rights emanating from the ADA exist independently of any employment rights granted by a CBA." *Saridakis v. United Airlines*, 166 F.3d 1272, 1277 (9th Cir. 1999). And, as in *Felt*, the Ninth Circuit rejected the employer's argument that preclusion applied if the employer's defense rested on a provision of the CBA.

> United contends that because its defense to Saridakis's charge of disability discrimination is based on a contractual right to terminate him, the CBA is inextricably implicated and the dispute is minor. In *Hawaiian Airlines*, however, the Supreme Court explicitly rejected this argument. . . . [T]he issue is whether Saridakis's

> disability claims under the ADA . . . are, in the first instance, subject to the RLA. In addressing this threshold question, United's justification for terminating Saridakis is of no import.

166 F.2d at 1277.

In *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249 (10th Cir. 1988), the Tenth Circuit held that the RLA does not preclude claims under 42 U.S.C. § 1981.

> [T]he source of McAlester's claim of racial discrimination is the statutory authority of § 1981, not the provisions of his collective bargaining agreement. . . . [W]e believe the RLA does not preclude an independent cause of action under § 1981. . . . In a § 1981 action, the plaintiff's right and the defendant's duty do not arise from an express promise made by either party. . . . The § 1981 action is founded on a statute which has as its object not the enforcement of contractual obligations but the recognition of a social right of equality of opportunity of persons regardless of race.

851 F.2d 1249, 1254-55. More recently that circuit reached the same conclusion regarding claims under Title VII:

> [M]ost of the cases addressing whether the RLA preempts claims under federal anti-discrimination statutes have held that there is no preemption. . . . [T]he RLA similarly does not preempt Adams' Title VII claim. . . . [A] cause of action under Title VII emanates from a source independent of the CBA. . . . [I]n proving the elements of her Title VII claim, it is not necessary that Adams first establish a breach of the CBA.

Adams v. American Airlines, Inc., 2000 WL 14399 *7 (10th Cir.). Although it was likely in *Adams* that the claims in that case would raise issues about the CBA, the court of appeals thought that irrelevant since "the evidence relating to the CBA goes to disprove the defendant's justification rather than to prove an element of the plaintiff's case." *Id.*[3]

(2) The courts of appeals have generally applied a very different standard where an employer argued that the RLA preempted state law. The fact that the right asserted by a plaintiff derives from a statute rather than the CBA, although generally treated as barring preclusion of a federal claim, usually does not bar preemption of a state claim. These decisions hold instead that enforcement of a claim based on state law is impermissible if the adjudication of that claim would require the court to "interpret" a CBA covered by the RLA.[4] The

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[3] The rare and narrow exceptions illustrate the force of the rule. In *Schiltz v. Burlington Northern R.R.*, 115 F.3d 1407 (8th Cir. 1997), the plaintiff asserted that under the CBA he was entitled to exercise seniority rights in a particular geographic region. The plaintiff grieved the issue under the CBA, and the National Railroad Adjustment Board held that the CBA gave him no such right. The plaintiff then filed an action under the ADEA, alleging that he had been denied the seniority right in question because of his age. The Eighth Circuit concluded that the federal courts could not reconsider the Board's authoritative interpretation of the CBA. 115 F.3d at 1415.

[4] *Kollar v. United Transportation Union*, 83 F.3d 124 (5th Cir. 1996); *Piper v. Alaska Airlines, Inc.*, 34 F.3d 1073, 1994 WL 424292 (9th Cir. 1994); *Anderson v. American Airlines,* (continued...)

circuit courts have repeatedly invoked this rule to bar enforcement of state civil rights statutes, including statutes like the ADA which forbid discrimination on the basis of disability.[5] There is a division among the courts of appeals, however, as to whether preemption bars the state claim where interpretation of the CBA relates not to an element of the plaintiff's underlying claim, but only to an affirmative defense.[6]

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[4] (...continued)
Inc., 2 F.3d 590 (5th Cir. 1993); *Croston v. Burlington Northern R.R. Co.*, 999 F.2d 381 (9th Cir. 1993); *Capraro v. United Parcel Service Co.*, 993 F.2d 328 (3d Cir. 1993); *Davies v. American Airlines, Inc.*, 971 F.2d 463 (10th Cir. 1992); *Bovers v. Flying Tiger Line Inc.*, 979 F.2d 291 (2d Cir. 1992); *Calvert v. Trans World Airlines, Inc.*, 959 F.2d 698 (8th Cir. 1992); *Higgins v. Newhouse*, 914 F.2d 256, 1990 WL 127551 (6th Cir. 1990); *Morales v. Southern Pacific Transportation Co.*, 894 F.2d 743 (5th Cir. 1990); *Deford v. Soo Line R.R. Co.*, 867 F.2d 1080 (8th Cir. 1989); *McCall v. Chesapeake & Ohio Ry. Co.*, 844 F.2d 294 (6th Cir. 1988); *Stephens v. Norfolk & Western Ry. Co.*, 792 F.2d 576 (6th Cir. 1986).

[5] *Audette v. International Longshoremen's and Warehousemen's Union*, 195 F.3d 1107 (9th Cir. 1999) (gender discrimination) (LRRM); *Croston v. Burlington Northern R.R. Co.*, 999 F.2d 381 (9th Cir. 1993) (discrimination on the basis of disability); *O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1 (1st Cir. 1992) (discrimination on the basis of disability); *Higgins v. Newhouse*, 914 F.2d 256, 1999 WL 127551 (6th Cir. 1990) (race discrimination); *McCall v. Chesapeake & Ohio Ry. Co.*, 844 F.2d 294 (6th Cir. 1988) (discrimination on the basis of disability); *Stephens v. Norfolk & Western Ry. Co.*, 792 F.2d 576 (6th Cir. 1986) (discrimination on the basis of disability).

[6] *Compare Hirras v. National Railroad Passenger Corp.*, 44 F.3d 278, 282 (5th Cir. 1995) (no preemption based on defense (continued...)

The state courts have been divided as to what standard to apply to RLA preemption arguments. A number of state decisions apply the narrow standard used by the federal courts in preclusion cases, at times expressly relying on that line of decisions.[7] They hold, for example, that preemption is never appropriate in civil rights cases or when a state statute is the source of the right asserted by the plaintiff.[8] Other state courts endorse the broad "interpretation" standard generally utilized by federal courts in preemption cases.[9] One state decision concludes that state law is preempted if it will be necessary to refer in any way to the relevant CBA, even if

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[6] (...continued)
involving CBA); *Taggart v. Trans World Airlines, Inc.*, 40 F.3d 269 (8th Cir. 1994) (same), *with Capraro v. United Parcel Service, Co.*, 993 F.2d 328, 333 (3d Cir. 1993) (contra); *Bovers v. Flying Tiger Line, Inc.*, 979 F.2d 291, 299 (2d Cir. 1992) (contra).

[7] *Gulati v. Burlington Northern Railroad Co.*, 364 N.W. 2d 446, 449 (Minn. App. 1985).

[8] *Evans v. Southern Pacific Transportation Co.*, 213 Cal. App. 3d 1378, 262 Cal. Rptr. 416 (Cal. App. 1989); *Quinn v. Southern Pacific Transportation Co.*, 76 Or. App. 617, 711 P. 2d 139 (Or. App. 1986); *Chicago & Northern W. R.R. v. Labor & Industry Review Comm'n*, 1978 WL 14726 (Wis. Cir. 1978).

[9] *Lara-Girjikian v. Mexicana Airlines*, 307 Ill. App. 3d 510, 718 N.E. 2d 584 (Ill. App. 1999); *Consolidated Rail Corp. v. Hudacs*, 223 A.D. 2d 289, 292, 645 N.Y.S. 2d 933 (Sup. Ct. 1996); *Eissinger v. Northwest Airlines, Inc.*, 1996 Minn. App. LEXIS 1132 * 7; *Harris v. Hirsh*, 86 N.Y. 2d 207, 212, 654 N.E. 2d 975, 630 N.Y.S. 2d 701 (1995); *Maher v. New Jersey Transit Rail Operations, Inc.*, 125 N.J. 455, 471, 593 A. 2d 750, 758 (1991).

its meaning may not be in dispute,[10] while others refuse to recognize preemption absent a showing that the rights at issue can be enforced through arbitration under the RLA itself.[11]

Three circuits have attempted to rationalize the existence of these very different standards by insisting that the standard for preclusion *should* be narrower than the standard for preemption. In *Bates v. Long Island R.R. Co.*, 997 F.2d 1028 (1993), the Second Circuit refused to apply an earlier decision regarding preemption of a state law to an ADA preclusion case.

> [The preemption case] is clearly distinguishable from the instant case, since it focused on avoiding state law interference with a federal statutory scheme. In this case, we deal with two federal statutory schemes . . . . These competing federal policies are not mutually exclusive; rather, they must be balanced.

997 F.2d at 1035. Similarly, the Sixth Circuit refused to apply this Court's preclusion decisions in a preemption case.

> [The law at issue in *Atchison, T. & S.F.Ry. v.] Buell*, [480 U.S. 557 (1987)] . . . is a *federal* statute. Likewise, the statutes in the cases cited by the Court were all federal statutes. . . . [the] Fair Labor Standards Act . . . 42 U.S.C. 1983 . . . Title VII . . . . In the instant case, we are con-

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[10] *Eissinger v. Northwest Airlines, Inc.*, 1996 Minn. App. LEXIS 1132 (1996).

[11] E.g., *Maher v. New Jersey Transit Rail Operations, Inc.*, 125 N.J. 455, 474, 593 A. 2d 750 (1991).

> cerned with a *state* statute. The issue is not the relationship between two federal statutes passed by Congress; it is the relationship between a federal statute and a state statute. . . .

McCall v. Chesapeake & Ohio Ry. Co., 844 F.2d 294, 299 (1988) (emphasis in original); see *Stephens v. Norfolk & Western Ry. Co.*, 792 F.2d 576, 581 n. 8 (6th Cir. 1987). In *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249 (10th Cir. 1988), the Tenth Circuit held that the standard in this Court's preemption decisions regarding state claims "does not apply necessarily to independent rights or claims derived from *federal* statutory schemes." 851 F.2d at 1254 (emphasis in original).[12]

The Seventh Circuit in the instant case expressly rejected the rule in the Second, Sixth and Tenth Circuits that different standards should be used in preclusion and preemption cases. It insisted, to the contrary, that the standards hitherto used in preemption cases should be applied as well in a preclusion case. "While the two types of cases implicate some different concerns, . . . we find the preemption question sufficiently similar to the preclusion question to make the analysis employed in RLA preemption cases applicable here." (App. 14).

The Seventh Circuit melded these conflicting lines of cases, creating a new hybrid standard that conflicts with both. The court of appeals held, on the one hand, that preclusion of a federal claim could be based solely on the fact that the case involved interpretation of a CBA, even though the underlying right asserted by the plaintiff

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[12] See 851 F.2d at 1255 n. 4 ("Several lower courts have determined the RLA does not bar a court's jurisdiction over a claim arising under a federal statute.")

derived from and enforced a federal statute rather than the CBA itself.

> [E]ven if Brown's claim is grounded upon rights which stem from some source other than the CBA . . . , the claim will be preempted if it cannot be adjudicated without interpreting the CBA . . . .

App. 7; see App. 17 (applying "the established RLA preemption/preclusion rule."). In this regard the decision below emphatically conflicts with prior preclusion cases in other circuits, which had insisted that preclusion was not appropriate where the source of the claim at issue was a federal civil rights statute.

In the instant case the plaintiff did not assert that the employer had violated the CBA. Rather, the employer raised the CBA as a defense, and the Seventh Circuit held that the mere assertion of that defense precluded enforcement of the ADA. The Ninth Circuit decision in *Saridakis v. United Airlines*, 166 F.3d 1272 (9th Cir. 1999), is squarely to the contrary:

> Our inquiry is strictly limited to determining if the rights under the ADA . . . are derived from sources independent of the CBA. We are satisfied they are. . . . Although United may be able to introduce and rely upon the CBA . . . as a part of its defense, . . . that would not be enough to render the dispute minor and therefore subject to the RLA's dispute resolution mechanism.

166 F.3d at 1277.

On the other hand, the Seventh Circuit held that its hybrid standard for preemption and preclusion cases would apply only where the interpretation of the CBA

provision in question could be *dispositive* of the merits of the claim. "A claim brought under an independent federal statute is precluded by the RLA only if it can be dispositively resolved through an interpretation of a CBA." (App. 24-25).[13] This is inconsistent with many of the preemption cases, which bar state law claims whenever any interpretation of a CBA would be involved, regardless of the manner in which that interpretation would affect the litigation.

The Seventh Circuit holds, for example, that preemption and preclusion are not warranted if resort to the CBA is needed only to resolve a dispute about whether a plaintiff was qualified (App. 25); the preemption cases are expressly to the contrary.[14] Under the decision below preclusion and preemption are not supported by an assertion "that the action challenged by the plaintiff is 'arguably justified' by the terms of a CBA." (App. 25). Preemption cases, on the other hand, bar state law claims in that situation.[15] The Fifth Circuit holds that preemption is required if reference would have to be made to a CBA merely to determine the appropriate

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[13] App. 25 ("Brown's claim would not have been precluded . . . if the disputed provisions of the CBA were relevant but not dispositive.")

[14] *Anderson v. American Airlines, Inc.*, 2 F.3d 590 (5th Cir. 1993); *Croston v. Burlington Northern R.R. Co.*, 999 F.2d 381 (9th Cir. 1993); *Maher v. New Jersey Transit Rail Operations, Inc.*, 125 N.J. 455, 482, 593 A. 2d 750, 764 (1991).

[15] *Bovers v. Flying Tiger Line, Inc.*, 979 F.2d 291, 299 (2d Cir. 1992).

remedy,[16] a standard far broader than that of the Seventh Circuit in the instant case.

The decision below renders the ADA reasonable accommodation provision largely unenforceable against railroads and air carriers. The very purpose of that statutory requirement is to compel employers to alter job conditions. But under the somewhat credulous standard utilized by the Seventh Circuit, it will almost always be possible for an employer to assert that a proposed accommodation would create a "new job". Under collective bargaining agreements new jobs are usually subject to bid, and are normally awarded on the basis of seniority. In *US Airways v. Barnett*, for example, the airline argued that if it provided Mr. Barnett with a forklift to move heavy objects, that too would be creating a new job, and the employer would thus have to let other workers bid to take Barnett's job away from him.

The decision below also reflects a far larger problem regarding the appropriate standards for resolving claims of preemption and preclusion under any federal statute. This Court's preclusion decisions, like the prevailing case law in the courts of appeals, focus on whether the source of the claim involved is a statute other than the labor relations law itself. *Atchison, Topeka & S.F.Ry. Co. v. Buell*, 480 U.S. 557 (1987) (Federal Employers Liability Act);[17] *Barrentine v. Arkansas-Best Freight System*,

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[16] *Morales v. Southern Pacific Transportation Co.*, 894 F.2d 743, 746 (5th Cir. 1990).

[17] *Buell* held that preclusion was not appropriate because an FELA claim is based, not on an asserted violation of a CBA, but on "rights arising out of a statute designed to provide

(continued...)

450 U.S. 728 (1981) (Fair Labor Standards Act).[18] This Court's most recent RLA preemption decision, *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), also contains repeated statements that preemption is not warranted if state law (rather than the CBA) is the source of the plaintiff's claim.[19] But other passages in *Hawaiian*

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[17] (...continued)
minimum substantive guarantees to individual workers." 480 U.S. at 565 (*quoting Barrentine*). The Court distinguished *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), on the ground that the claim in that case, although relying on state law, was "based squarely on an alleged breach of the collective-bargaining agreement." 480 U.S. at 566.

[18] 450 U.S. at 737 ("While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.")

[19] 512 U.S. at 253 ("major disputes seek to create contractual rights, minor disputes to enforce them") (*quoting Consolidated Rail Corporation v. Railway Labor Executives' Assn.*, 491 U.S. 299, 302 (1989), 254 ("[S]ignificantly, the adjustment boards charged with administration of the minor-dispute provisions have understood these provisions as pertaining only to disputes invoking contract-based rights"), 255 ("the category of minor disputes contemplated by § 151a are those that are grounded in the CBA"), 257 (distinguishing the decision in *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), on the ground that "the employee's claim was firmly rooted in a breach of the CBA itself"), 260 (distinguishing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), on the ground that "the duties the employer owed the employee . . . were rooted firmly in the CBA"), 264 (preclusion inappropri-
(continued...)

Airlines suggest, to the contrary, that preemption may be required solely because application of that state law would involve the interpretation of a CBA.[20] Yet a different set of standards have been formulated for cases in which the parties agree a dispute is governed by the RLA, and the court must resolve whether the dispute is "major" or "minor." E.g., *Consolidated Rail Corporation v. Railway Labor Executives' Association*, 491 U.S. 299 (1989). Because the language of these distinct but related lines of cases varies to a considerable degree, it is possible to find in one or more opinions of this Court support for any number of quite different preclusion or preemption standards. The courts of appeals have done precisely that. The considerable tension between the two aspects of *Hawaiian Airlines*, and between these formulations and the standards used by this Court in *Buell*, *Barrentine*, and *Consolidated Rail Corporation*, has given rise to the confusion in the lower courts reflected in the Seventh Circuit decision. This Court should grant certiorari to resolve that problem.

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[19] (...continued)
ate where claim is based on "a norm established by a legislature or a court.")

[20] 512 U.S. at 253 ("[M]inor disputes involve 'controversies over the meaning of an existing collective bargaining agreement' "), 256 ("minor disputes [are] those involving the interpretation or application of existing labor agreements"), 261 ("where the resolution of a state-law claim depends on an interpretation of the CBA, the claim is pre-empted"), 262 (preemption not warranted if "the state-law claim can be resolved without interpreting the agreement itself").

II. THE VALIDITY OF THE SENIORITY-BASED DEFENSE RECOGNIZED BY THE SEVENTH CIRCUIT IS CURRENTLY BEFORE THIS COURT IN *US AIRWAYS, INC. v. BARNETT*.

The seniority-based defense relied on by the court below derives from an earlier Seventh Circuit decision in *Eckles v. Consolidated Rail Corporation*, 94 F.3d 1041 (7th Cir. 1996). (App. 10). In *Eckles*, as here, the plaintiff had asserted an ADA reasonable accommodation claim. The court of appeals in *Eckles* held that an employer could create an absolute defense to an ADA accommodation claim by establishing a seniority policy that would be inconsistent with the proposed accommodation. Although the policy involved in *Eckles* was contained in a collective bargaining agreement, the reasoning of that case was equally applicable to a seniority rule not created by such an agreement.

The correctness of the *Eckles* defense is currently before this Court in *US Airways, Inc. v. Barnett*, No. 00-1250. The Ninth Circuit in *Barnett* rejected the validity of a seniority-based defense, at least absent a collective bargaining agreement. The petition for writ of certiorari in that case correctly observed that the Ninth Circuit decision was inconsistent with the reasoning of the Seventh Circuit opinion in *Eckles*. (Petition for a Writ of Certiorari, No. 00-1250, p. 17). The merits brief filed by petitioner in *US Airways, Inc. v. Barnett* expressly relies on *Eckles*. (Brief for Petitioner, pp. 30, 34).

The petitioner in *US Airways, Inc. v. Barnett* contends in its merits brief that the availability of a seniority-based defense should not depend on whether the seniority policy is contained in a collective bargaining agreement. (Brief for Petitioner, pp. 38-42). The legal issues

in contention in *US Airways* concern the very reasoning on which the Seventh Circuit relied in *Eckles*. US Airways contends, as *Eckles* asserted, that an accommodation cannot be "reasonable" if it adversely affects seniority rights. (*Eckles*, 94 F.3d at 1045; Brief for Petitioner, pp. 14-22). Barnett, on the other hand, argues that the term "reasonable" in section 12112(b)(5)(A) of the ADA refers only to the efficacy of an accommodation. (Brief for Respondent, pp. 12-21). US Airways relies heavily on the decision in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), as did *Eckles*. (*Eckles*, 94 F.3d at 1048; Brief for Petitioner, pp. 33-35). The respondent in *US Airways* disputes the relevance of *Hardison*. (Brief for Respondent, pp. 42-45). Both *Eckles* and US Airways insist that a position is not truly "vacant" if it is to be awarded on the basis of seniority, a contention disputed by Barnett. (*Eckles*, 94 F.3d at 1047-48; Brief for Petitioner, p. 37; Brief for Respondent, pp. 47-50).

The validity of the *Eckles* defense may well be resolved in *US Airways, Inc. v. Barnett*. If this Court concludes that there is not a seniority-based defense under the ADA, the Seventh Circuit decision in the instant case would clearly have to be set aside. If the Court in *US Airways* decides only whether a seniority-based defense can be asserted outside the context of a collective bargaining agreement, and holds that it cannot, then this case would provide an appropriate vehicle for determining whether the defense is available where there is such an agreement. If this Court holds in *US Airways* that there is a seniority-based defense in all ADA reasonable accommodation cases, regardless of whether there is a collective bargaining agreement, the first question presented by this petition would be ripe for review.

In light of the similarity of the issues involved, we suggest that this Court defer action on the instant petition until it has decided *US Airways, Inc. v. Barnett*.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the decision of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

App. 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-2349

ROBERT BROWN,

Plaintiff-Appellant,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 4836—**Charles P. Kocoras**, *Judge.*

ARGUED JANUARY 22, 2001—DECIDED JUNE 20, 2001

Before BAUER, KANNE, and EVANS, *Circuit Judges.*

BAUER, *Circuit Judge.* Robert Brown, aided by the Equal Employment Opportunity Commission ("EEOC") as *amicus curiae*, appeals the district court's dismissal of a claim which he brought under the Americans with Disabilities Act ("ADA") 42 U.S.C. § 12101, *et seq.* for lack of subject-matter jurisdiction. The district court found that Brown's claim was precluded by the mandatory arbitration provisions of the Railway Labor Act ("RLA") 45 U.S.C. § 151, *et seq.* For the reasons set forth below, we affirm.

BACKGROUND

Illinois Central Railroad Company ("IC") is a "carrier" by rail under the RLA and an "employer" under the ADA head-

quartered in Chicago, Illinois. IC's operations are divided into several departments, which in turn are subdivided into various groups of employees, or "crafts." Each craft has its own separate identity, with its own collective bargaining agreement ("CBA"), work rules, and seniority. Brown has worked in IC's Transportation Department in the trainman/brakeman/switchman ("trainman") craft[1] since 1979. IC's trainmen are represented by the United Transportation Union ("UTU"), which has entered into a CBA with IC on their behalf.

IC has two types of trainman positions—regularly scheduled, and "guaranteed extra board" ("GEB"). GEB trainmen fill in for absent regular trainmen and allow the railroad to cope with unexpected surges in operations (such as the unscheduled arrival of trains in the yard) which create a need for extra workers on short notice. Prior to May of 1995, IC had two types of GEB positions—"yard" and "road." Trainmen who were assigned to yard jobs worked in a prescribed geographical area and had restricted starting times. Yard GEBs had two assigned days off per week, while road GEBs had no assigned days off. In May of 1995, IC eliminated the yard GEB position. Work that had previously been performed by yard GEBs has since been performed by road GEBs, like Brown.

Road GEB trainmen at IC are called to work according to the following procedure: GEB trainmen are listed on a "call board," with the trainman who has been without a job assignment for the longest period of time at the top, followed in descending order by each trainmen who has worked more

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[1] The trainman craft includes trainmen/brakemen/switchmen ("trainmen") and conductors. A trainman's primary job duties are to throw track switches, couple and uncouple cars, couple and uncouple hoses, and engage and disengage brakes. Conductors perform trainman duties and supervisory functions.

recently. When a fill-in worker is needed, an IC crew dispatcher calls the GEB trainman at the top of the list and assigns him to work. While he is working, his name is taken off of the call board. When the trainman finishes his assignment, he "marks back up," meaning that his name is put back on the call board, this time at the bottom of the list. As those above him are called to jobs, their names are taken off the call board, and the worker at the bottom moves up the board until he is again at the top, making him eligible to be called to work when the need arises. This cycle repeats itself continually, constantly changing the order of the trainmen on the list.

Regularly scheduled (non-GEB) trainmen have a specific work schedule and location. They work six days per week on a regular basis, and have one assigned day off per week. By contrast, GEB trainmen do not have assigned days off. The CBA requires IC to staff the GEB with a sufficient number of employees so as to permit both regular and GEB employees to have "reasonable layoffs," but the CBA does not define what constitutes a "reasonable" layoff. Trainmen with the most seniority at IC fill the regular, six day per week positions. Since it abolished all yard jobs in May of 1995, IC has taken the position that GEB employees be available for work seven days per week, 24 hours a day (subject to the federal hours of service laws). The CBA guarantees GEB trainmen payment for each day they are on GEB status and available to work,[2] regardless of whether they actually work. However, Brown disputes whether seven day per week, 24 hours a day availability is a requirement of the GEB trainman position.

Brown began working for IC in October of 1978, and transferred to the trainman craft in May of 1979. Brown was qualified as a conductor in May 1980, and worked in

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[2] However, an employee who lays off sick is not paid for that day.

that position for approximately eight years. At some point during his employment, Brown was diagnosed by his personal physician as having schizoaffective disorder. He was first hospitalized for this condition in 1988, suffering from depression, paranoia, and suicidal feelings. Schizoaffective disorder can interfere with an individual's ability to learn new concepts, and, according to the testimony of one of Brown's treating physicians, it can cause hallucinations, disorganized thinking, delusions, obsessions, social withdrawal, and depressive episodes.

In November of 1989, Brown's personal physician informed IC that Brown's psychiatric condition rendered him unable to withstand the stress associated with the supervisory tasks performed by conductors or foremen, and limited him to "helper only" jobs, such as brakeman or switchman. The parties dispute whether IC immediately accommodated Brown's psychiatric condition, however they agree that since at least April of 1993 IC has allowed Brown to work only "helper" trainman's jobs. This was done while Brown continued to work off of the call board. If a conductor job opened up while Brown was at the top of the list, he would decline the job and it would be assigned to the next trainman on the list. Prior to the reclassification of yard trainman jobs in May of 1995, Brown held a GEB yard job which required him to work various shifts five days per week, with assigned days off on Mondays and Tuesdays. IC found Brown medically qualified to perform this job. Beginning in June 1995, after assigned rest days were eliminated for all GEB positions, Brown generally would lay off sick on a routine basis two days per week. For approximately one year, IC made no objection to this practice. During this time, Brown's work was generally acceptable and he was never disciplined for poor attendance.

In February of 1996, several months after all Chicago GEB yard assignments were eliminated and replaced with road crews, John Kay became Superintendent of IC's Chi-

cago area operations. Starting the following May, Kay analyzed employee work records which showed the number of days that individual employees were laying off work. After concluding that several employees were laying off excessively, Kay met with several trainmen, including Brown, to discuss their attendance. Kay insisted that Brown be available for work seven days a week. At a meeting on June 11, 1996, Brown gave Kay a note from his physician restricting him to working a maximum of five days a week due to his disorder. IC did not provide Brown the accommodation he requested, and it medically disqualified him from employment on June 13, 1996 on the ground that he would not be available to work seven days per week as required by the GEB trainman position.

Brown remains on IC's seniority list and according to IC he is eligible to return to work if his restrictions are lifted or GEB requirements change. At the time of his disqualification, all regular (6 day per week) trainmen positions were held by trainmen with higher seniority than Brown. However, by the time this case was litigated in the district court, some of those positions were held by employees with less seniority than Brown. At the time of his disqualification, Brown ranked 216th out of 226 on the seniority list, meaning that only 10 trainmen had less seniority than Brown.

UTU urged IC to accommodate Brown, and after IC medically disqualified Brown, UTU pursued a labor grievance on his behalf contending that his disqualification violated the CBA and that he was entitled to a reasonable accommodation under the ADA. The Public Law Board denied Brown's CBA claims and declined to address his ADA claims, accepting IC's argument that it lacked the statutory authority to resolve such claims.

After filing a discrimination charge with the EEOC and receiving a Notice of Right to Sue, Brown filed suit under

the ADA, claiming that he was qualified to work as a GEB trainman with the reasonable accommodation of being allowed to lay off two days per week, and that IC violated the ADA by disqualifying him from work. Brown was examined by Dr. Alexander Obolsky, plaintiff's expert witness, who opined that it was not necessary that Brown always work exactly five days, followed by two consecutive days off; rather, Brown could work as few as three or as many as to six or seven days in a row (as his condition allowed), so long as he worked five days out of every seven on average. IC moved for summary judgment, arguing that Brown's schizoaffective disorder is not a "disability" under the ADA, that Brown is not a "qualified individual," and that the accommodation that Brown proposed was not "reasonable." The district court denied the motion, finding that genuine issues of material fact existed as to these issues. IC then moved to dismiss, arguing that because the resolution of Brown's claim required the court to construe various provisions of the CBA, the RLA precluded Brown from bringing his claim in court, and therefore the district court lacked subject-matter jurisdiction over the claim. Accepting IC's arguments, the district court dismissed Brown's ADA claim, and Brown has appealed.

DISCUSSION

The sole issue presented for review is whether the mandatory arbitration provisions of the RLA preclude Brown from bringing his ADA claim in federal court, thereby stripping the district court of subject-matter jurisdiction. The district court answered this question in the affirmative and granted IC's motion to dismiss for lack of subject-matter jurisdiction. We review the district court's decision on this issue *de novo*. *See Monroe v. Missouri Pacific R.R. Co.*, 115 F.3d 514, 516 (7th Cir. 1997) (citation omitted).

The RLA promotes stability in labor-management relations by "providing a comprehensive framework for resolving labor disputes" in the railroad industry. *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994) (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987)); *see also* 45 U.S.C. § 151a. Specifically, the RLA establishes a mandatory arbitral mechanism for "the prompt and orderly settlement" of two classes of disputes—"major disputes" and "minor disputes." *See* 45 U.S.C. § 151a. Major disputes "relate to the formation of collective bargaining agreements or efforts to secure them." *Hawaiian Airlines*, 512 U.S. at 252 (citation and internal quotation omitted). Minor disputes, by contrast, "gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions[,]" 45 U.S.C. § 151a, and "involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Hawaiian Airlines*, 512 U.S. at 253 (citation omitted). All minor disputes "must be adjudicated under RLA mechanisms, which include an employer's internal dispute-resolution procedures and an adjustment board established by the unions and the employer." *Monroe*, 115 F.3d at 516; 45 U.S.C. § 184. A plaintiff's claim is properly characterized as a minor dispute (and is therefore subject to mandatory and exclusive arbitration under the RLA) when the resolution of the plaintiff's claim requires interpretation of the CBA. *See Monroe*, 115 F.3d at 519; *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579, 583 (7th Cir. 1999) (stating that "[t]he distinguishing feature of a minor dispute is that the dispute can be conclusively resolved by interpreting the existing CBA." (citation and internal quotation omitted)). Therefore, even if Brown's claim is grounded upon rights which stem from some source other than the CBA (such as state law), the claim will be preempted if it cannot be adjudicated without interpreting the CBA, or if it can be "conclusively resolved" by interpreting the CBA. *See Hawaiian Airlines*, 512 U.S. at 261-62; *Consolidated*

Rail Corp v. Ry. Labor Executives' Ass'n, 491 U.S. 299, 305 (1989).

The ADA prohibits employment discrimination against "qualified individual[s] with disabilit[ies]." 42 U.S.C. § 12112(a). Under the ADA, prohibited discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . ." 42 U.S.C. § 12112(b)(5)(A). All covered entities must provide a reasonable accommodation to qualified individuals with disability unless they can demonstrate that such accommodation would impose an "undue hardship" on the operation of their business. *See id.* The ADA is a comprehensive statute designed to end disability discrimination in the workplace in all industries, and it does not exempt the railroad and airline industries from its reach.

IC argues, and the district court agreed, that the resolution of Brown's ADA claim requires interpretation of various provisions of the CBA. First, IC notes that in attempting to establish that he is a "qualified individual with a disability," Brown will have to demonstrate that he is able to perform the "essential functions" of the job at issue, with or without a reasonable accommodation. Since Brown concedes that his schizoaffective disorder renders him unable to work seven days a week on a consistent basis (and does not argue that a reasonable accommodation would remove this impairment), in order to prevail on his claim he will need to show that being consistently available for work seven days a week is not an "essential function" of the GEB trainman position. However, IC contends that the CBA forecloses Brown from making any such showing because it guarantees GEB Trainman payment for seven days per week regardless of the number of days that they actually work, implicitly requiring seven day per week availability as a

quid pro quo for this salary guarantee.[3] Brown challenges this interpretation of the CBA, and argues that no CBA provision explicitly establishes seven day per week availability as a requirement of the GEB trainman position.[4] IC argues that the conflict between the parties on this issue turns on a dispute regarding the interpretation of the CBA, and as such it must be arbitrated pursuant to the RLA.

Moreover, IC argues that the district court could not have determined whether Brown's requested accommodation was "reasonable" without interpreting other disputed provisions of the CBA. For example, Section 5, Article 3 of the Trainmens' schedule agreement lists various circumstances under which GEB trainmen should be allowed to lay off from work and provides that "for good reason . . . an employee should be permitted to be absent from work within reasonable limits." It also notes that, while "the company is warranted in controlling the privilege of laying off," "it should do so reasonably." This invites the question of whether the CBA right to "reasonable layoffs" encompasses the right to layoff periodically (and regularly) as needed, even if that means laying off for up to two days per week. IC contends that the district court could not determine whether Brown's requested accommodation was "reasonable" (an essential element of his ADA claim) without answering this question.

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[3] The CBA provides that "[e]ach employee assigned to the guaranteed . . . extra board shall be guaranteed 14 days at the conductor road switcher rate each bi-weekly period." Crew Consist Agreement, Art. III, Section 2, R. 60, Ex. 2, p. 8. IC argues that the requirement of seven day per week availability was something that IC aggressively bargained for after it eliminated regular yard jobs.

[4] Brown also notes that the IC's job description for the trainman position does not list as part of the job's requirements that the employee be available 7 days per week.

Further, IC points to Section 2, Article 55 of the Trainmens' Schedule Agreement ("Article 55"), which provides:

> [w]hen established runs are changed by advancing or retarding the earliest listing time one hour or more, or a change is made in the number of days the run is bulletined to operate each week, . . . it will be considered a new run and bulletined accordingly.

Applying this provision, IC argues that granting Brown the accommodation he seeks would amount to creating a new position (namely, a GEB position requiring less than 7 days of availability per week) which IC would be obligated to place up for bidding among the other trainmen. IC maintains that allowing Brown the right to the regular layoffs he requests without first offering this privilege to trainmen with greater seniority would flout both Article 55 and the general seniority provisions established under the CBA. Such an accommodation would be unreasonable as a matter of law, because "the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees." *See Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1051 (7th Cir. 1996). Therefore, IC argues that the merits of Brown's ADA claim depend upon an interpretation of the CBA (i.e., that an interpretation of the CBA will "conclusively resolve" the claim), and consequently, that the claim is a "minor dispute" which is preempted/precluded by the RLA. The district court accepted these arguments.

Brown counters that there is nothing in the CBA that requires seven day per week availability, so there is no need to interpret the CBA when determining the "essential functions" of the GEB trainman position for ADA purposes. He also denies that granting him the accommodation he seeks would create a new position and violate the CBA by infring-

ing on the seniority rights of other workers.[5] In support of this, Brown notes that the Guaranteed Extra Board operates in a "singularly non-seniority manner"; workers are called off the call board for work in the order that their names appear on board, which in turn is determined strictly by when each worker "marked back up." Consequently, the order of the trainmen on the call board changes constantly without regard to the CBA's seniority provisions. Therefore, Brown contends that if he were permitted to lay off in the manner he requests, he would not receive rights or privileges denied to other GEB trainmen, thereby creating a new position and implicating the CBA's seniority provisions. Rather, he would merely delay his own opportunity to work off of the call board, and would open up a job for the next trainman on the board. Brown asserts that causing a fellow worker to jump ahead one space on the call board and to perform work that he was already slated to perform a bit earlier than he had planned does not in any way change the operation of the call board or infringe on the seniority rights of other trainmen. In addition, Brown claims that the fact that he actually used this requested method of accommodation for a year before his disability-based disqualification and received no complaints from either the union, the railroad, or other workers proves that it did not violate the CBA's seniority provisions.

While we do not accept all of IC's arguments, we agree that the resolution of Brown's ADA claim depends in one crucial respect upon interpretation of the CBA. The CBA expressly states that "when a change is made in the number of days the run is bulletined to operate each week, it will be considered a new run and bulletined accordingly." Therefore, it seems quite possible that the accommodation

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[5] Brown also notes that the UTU has never taken this position either, but instead has urged IC to grant Brown the accommodation he seeks.

that Brown seeks would create a new position that is subject to bidding under the CBA. Therefore, allowing Brown to lay off in the manner that he requests without first offering the same layoff privileges to more senior trainmen might very well violate the seniority system established by the CBA. This seems particularly likely given that Brown requests regular layoffs of up to two days per week, and the regular (non-GEB) trainman position (which at the time of Brown's disqualification was held exclusively by trainmen with greater seniority than Brown) has only one assigned day off per week. Moreover, and most important for our purposes, the determination of whether or not Brown's requested accommodation would violate the seniority provisions of the CBA will potentially be dispositive of Brown's ADA claim, because requested accommodations which would interfere with the bona fide seniority rights of other employees are unreasonable as a matter of law, and not mandated by the ADA.[6] *See Eckles,* 94 F.3d at 1051. Therefore, the adjudication of Brown's ADA claim cannot go forward until Article 55 and the seniority provisions of the CBA are interpreted, and the court's interpretation of those provisions could conclusively resolve Brown's claim, making it a "minor dispute" under the RLA. The fact that GEB trainmen are called to work from the call board in chronological order rather than according to seniority does not change this fact. The important question is not how work is assigned among GEB trainmen, nor how Brown's requested layoffs would affect the chronology of trainmen assignments. Rather, the question raised by IC is whether allowing Brown to lay off as he requests would create for Brown

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[6] It should be noted that this rule only applies if the seniority system at issue is "bona fide," or created for a legitimate purpose rather than a discriminatory purpose. *See Eckles*, 194 F.3d at 1046 n.7, 1051. However, Brown does not argue that the CBA's seniority system was not "bona fide."

a GEB trainman position entailing fewer regular hours per week than the standard GEB trainman position, therefore creating a new position under Article 55 of the CBA.[7]

However, even though Brown's ADA claim cannot be resolved without interpreting the CBA, it is not immediately clear whether this fact alone will prelude him from bringing the claim in federal court. Amicus EEOC argues that while the RLA's mandatory arbitration provisions strip courts of jurisdiction to adjudicate *state law* claims whose resolution depends upon an interpretation of a CBA, *see e.g., Hawaiian Airlines*, 512 U.S. at 261-63 (applying *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988)), they do not as a matter of course preclude similar claims brought under a *federal* statute. Unlike cases involving the RLA's *preemption* of state law, Brown's case forces us to decide whether the RLA *precludes* a claim brought under another federal statute, and this choice "requires an analysis of both [federal statutes], to see if they are indeed incompatible or if they can be harmonized, and if they are incompatible to decide which one Congress meant to take precedence." *Coker*, 165 F.3d at 583-84 (citations omitted). Therefore, according to the EEOC, the district court applied the wrong analysis when it determined that Brown's ADA claim was barred simply because it could be characterized as a "minor dispute," rather than carefully analyzing the two federal statutes at issue to determine what effect Congress intended each to have upon the other. Further, the EEOC asserts that the district court erred in relying on cases involving the RLA's preemption of state law claims.

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[7] Moreover, the fact that Brown effectively implemented the accommodation he seeks by laying off as needed for one year and no one complained says nothing about whether allowing Brown to work in this manner created a new position under Article 55 and should have been listed for bidding.

We do not agree that the district court applied the wrong analysis when deciding Brown's claim. First, the district court was aware that its task was to analyze the ADA and the RLA "to determine if they are incompatible or if they can be harmonized," and the court made it clear that its holding was an attempt to harmonize the two statutes (or to give them simultaneous effect). The district court thus applied the proper preclusion standard, and did not decide the case entirely by resorting to preemption standards. Second, we do not find that cases addressing the RLA's preemption of state law claims are wholly irrelevant to the cases like Brown's which involve the RLA's potential preclusion of a claim brought under another federal statute. While the two types of cases implicate some different concerns, *see Coker*, 165 F.3d at 583 (citations omitted) (stating that, unlike preemption, "the question of whether one federal law takes precedence over another does not implicate the Supremacy Clause"), we find the preemption question sufficiently similar to the preclusion question to make the analysis employed in the RLA preemption cases applicable here. *See Saridakis v. United Airlines*, 166 F.3d 1272, 1276 (9th Cir. 1999) (stating that "the preemption doctrine per se does not govern questions relating to the compatibility of two of more federal laws," but noting that "[l]ike the preemption question, [the preclusion] inquiry centers on congressional intent," and applying RLA preemption cases like *Hawaiian Airlines* in its preclusion analysis); *Felt v. Atchison, Topeka, & Santa Fe Ry. Co.*, 60 F.3d 1416, 1418-19 (9th Cir. 1995) (same); *see also Schiltz v. Burlington Northern R.R.*, 115 F.3d 1407, 1415 (8th Cir. 1997) (relying on RLA preemption standards in holding that the RLA precluded a plaintiff-employee's ADEA claim which was "inextricably intertwined" with provisions of a CBA outlining employees seniority rights); *Fry v. Airline Pilots Ass'n, Int'l*, 88 F.3d 831, 836 (10th Cir. 1996) (ruling that under current Supreme Court jurisprudence "the threshold question remains whether resolution of the *federal and* state law claims of

the plaintiffs requires interpretation or application of the CBAs." (citations omitted) (emphasis supplied)); *cf. Hawaiian Airlines*, 512 U.S. at 259 n.6 (applying *Buell*, 480 U.S. 557 (1987), an RLA preclusion case, in the preemption context and stating that the fact that *Buell* was a preclusion case "does not rob *Buell* of its force in [the preemption] context" because "principles of federalism demand no less caution in finding that a federal statute pre-empts state law") (citation omitted). The standard established for the RLA's preemption of state law will not by itself conclusively resolve the question of whether the RLA precludes another federal claim, because the latter question requires courts first to analyze the two federal statutes in an effort to ascertain Congressional intent. Nevertheless, the RLA preemption standard remains relevant to the preclusion inquiry, and we find that the preemption standard should govern in a preclusion case unless the analysis of the two federal statutes clearly suggests otherwise.

Moreover, an examination of the ADA's language and legislative history reveals no clear congressional intent to override the RLA's requirement that minor disputes be adjudicated exclusively through the RLA's arbitration machinery. The EEOC notes that in enacting the ADA, Congress recognized that while the terms of a CBA "could be relevant . . . in determining whether a given accommodation is reasonable . . . the agreement would not be determinative on the issue." H.R. Rep. No. 101-485, pt. 2 at 63 (1990) ("H.R. REP."), *reprinted in* 1990 U.S.C.C.A.N. 303, 345; *see also* S. REP. No. 101-116, at 32 (1989) ("S. REP."). In addition, the EEOC points to similar language in the ADA's House and Senate Reports stating that "if the [CBA] includes job duties, it may be taken into account as a factor in determining whether a given task is an essential function

of the job." S. REP. at 32; *see also* H. R. REP. at 63.[8] Relying on this language, the EEOC maintains that Congress expressly contemplated that courts would consider the relevant provisions of a CBA in adjudicating ADA claims, and argues that this evidences Congress' intent that the ADA take precedence over the RLA's provisions providing for the mandatory and exclusive arbitration of all disputes requiring the interpretation of CBAs. Moreover, as further support for this conclusion, the EEOC notes that, unlike ERISA, the ADA contains no provision stating that it was not meant to "alter, amend, modify, invalidate, impair, or supercede any law of the United States . . . or any rule or regulation issued under any such law." *See* 29 U.S.C. § 1144(d). We have found such language sufficient to preserve the RLA's exclusive jurisdiction over minor disputes brought under ERISA, *see Coker*, 165 F.3d at 584, and the EEOC concludes from the absence of a similar provision in the ADA that we should reach the opposite conclusion here. In addition, the EEOC relies on a portion of the ADA's legislative history providing that an employer's "obligation to comply with [the ADA] is not affected by any inconsistent term of any collective bargaining agreement to which it is

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[8] *See also* 29 C.F.R. § 1630.2(n)(3) (2000) (stating that evidence of whether a particular function is essential for ADA purposes includes, *but is not limited to*:

> (i) The employer's judgment as to which functions are essential; (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) the consequences of not requiring the incumbent to perform the function; (v) *the terms of a collective bargaining agreement*; (vi) the work experience of past incumbents in the job; and/or (vii) the current work experience of incumbents in similar jobs. (emphasis supplied)).

See also Lenker v. Methodist Hosp., 210 F.3d 792, 796 (7th Cir. 2000).

a party" because "an employer cannot use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under this Act." H.R. REP. at 63; *see also* S. REP. at 32. Finally, the EEOC notes that the ADA is a comprehensive Act intended to determine certain personal rights for workers in all industries, and that it does not expressly exempt the railroad industry from its reach as do certain other statutes. *See, e.g.*, 29 U.S.C. § 213(b)(2). However, we do not find that any of this amounts to a clearly expressed Congressional intent to override any requirement of the RLA. The passages from the ADA's legislative history quoted above are not inconsistent with the standard rule regarding the RLA's preemption or preclusion of minor disputes. It has long been established that "not all cases which tangentially touch collective bargaining agreements call for . . . preemption." *Monroe*, 115 F.3d at 519 (quoting *Loewen Group Int'l, Inc. v. Haberichter*, 65 F.3d 1417, 1423 (7th Cir. 1995). "When the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished." *Loewen*, 65 F.3d at 1421 (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 124 (1994)). Therefore, the mere fact Congress anticipated that courts could "look to" (or "consider") the provisions of a CBA in deciding an ADA claim does not imply that Congress intended to override the traditional preemption/preclusion standards under the RLA. (This is particularly true given that the parties to an ADA claim often might not even dispute the interpretation of the CBA provisions at issue.) Moreover, as has been noted, under the established RLA preemption/preclusion rule, the RLA will not bar a plaintiff from bringing an independent state or federal claim in court unless the claim could be "conclusively resolved" by the interpretation of a CBA (that is, unless the interpretation of some provision(s) of the CBA could be dispositive of the plaintiff's claim). Since the provisions of a CBA are relevant but *not*

dispositive in determining whether a proposed accommodation is reasonable or whether a particular job function is an "essential function" under the ADA, it could be argued that a court's consideration of CBAs for such purposes in general would not transform the claim into a minor dispute subject to preclusion by the RLA.[9] However, when the heart of the dispute between the parties is a disagreement over the interpretation of some part of a CBA, the resolution of which could by itself resolve the claim, the claim would be precluded by the RLA under the traditional rule. Nothing in the text or legislative history of the ADA clearly overturns this rule, and we find the mere absence of language in the Act exempting railroads from its reach or stating that it was not meant to alter prior laws insufficient to do so. Without clearer guidance from Congress, we must conclude that Congress did not intend for the ADA to displace the RLA's mandatory arbitration provisions. *See United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 865 (7th Cir. 1998) ("Absent a clearly expressed intention that Congress intended one federal statute to preempt another, courts must regard each as effective and give them simultaneous effect.") (citation omited). We feel that the best way to harmonize these two statutes is to allow a plaintiff employee to bring an ADA claim in federal court against his employer (even if his employment is governed by a CBA which is subject to the RLA), *unless* the resolution of his ADA claim requires the court to interpret the CBA's terms as a potentially dispositive matter. Accordingly, because Brown's claim requires a potentially dispositive interpretation of the CBA's seniority provisions, we hold the RLA precludes his

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[9] For this reason, unlike the district court, we reject IC's arguments that Brown's claim is precluded by the RLA merely because the court would have to consult certain provisions of the CBA in determining whether seven day per week availability is an "essential function" of the GEB trainman position.

claim. Allowing Brown to bring his claim in federal court would sanction a judicial incursion into what the RLA defines as the exclusive province of the RLA arbitration boards—the resolution of claims by reference to the terms of CBAs. This would "lead to the evisceration of the grievance and arbitration procedures provided by the RLA," *see Schiltz*, 115 F.3d at 1415, and we are unwilling to take this bold step without a clearer Congressional mandate.

However, one further challenge to our holding needs to be addressed. In addition to its argument from the legislative history of the ADA, the EEOC contends that relevant case law conclusively establishes that the RLA cannot preclude a plaintiff from obtaining judicial resolution of independent claims brought under federal statutes like the ADA which confer rights upon individual employees. Relying on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the EEOC notes that contractual rights arising under a CBA and statutory rights provided by federal employment discrimination laws are "distinctly separate" in nature and independent of one another, and that an aggrieved employee is free to vindicate each type of right separately in its proper forum (by bringing CBA rights to arbitration or to whatever forum the CBA dictates, and by litigating federal statutory claims in court). *See Gardner-Denver*, 415 U.S. at 50-52. The EEOC also points to language in *Gardner-Denver* stressing that arbitrators have "authority to resolve only questions of contractual rights," and have "no general authority to invoke public laws that conflict with the bargain between the parties," *see id.* at 53-54, arguing that claimants like Brown who seek judicial resolution of their federal claims should not be forced to bring those claims before an arbitrator who lacks the authority to resolve them. Moreover, relying on *Buell*—a case which addressed the RLA's effect upon a claim brought under the Federal Employers' Liability Act (FELA)—the EEOC argues that the RLA's requirement of binding arbitration of contractual disputes does not pre-

clude a disabled employee from seeking judicial enforcement of his independent statutory right to a workplace free from disability discrimination under the ADA. In *Buell*, the Court rejected the defendant-railroad's argument that the RLA provides "the exclusive forum for any dispute arising out of workplace conditions," reasoning that "notwithstanding the strong policies encouraging arbitration, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." 480 U.S. at 563, 565 (citation and internal quotation omitted). The Court held that "the fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages." *Id.* at 564.

However, while the cases cited by the EEOC stress the independence of claims brought under federal statutes from similar claims brought pursuant to the provisions of a CBA, and establish a plaintiff's general right to judicial resolution of his federal claims, none of them hold that a federal claim *whose resolution depends upon the interpretation of a CBA* should not be precluded by the RLA. The question presented in *Gardner-Denver* as whether an employee's statutory right to trial *de novo* for a claim brought under Title VII may be foreclosed by the plaintiff's prior submission of a claim involving the same facts to final arbitration under the nondiscrimination clause of the CBA. *Gardner-Denver* held that the plaintiff could bring his Title VII claim in federal court, regardless of whether or how his claims brought under the CBA's discrimination clause were resolved, because his Title VII rights were distinct from and independent of his rights under the CBA. However, unlike Brown's ADA claim, the Title VII claim brought in *Gardner-Denver* did not depend for its resolution on the interpretation of a CBA. *Gardner-Denver* holds only that "the federal

policy favoring arbitration does not establish that an arbitrator's resolution of a contractual claim is dispositive of a statutory claim under Title VII." 415 U.S. at 46 n.6. While we certainly do not question that proposition, it does not guide us in resolving the matter before us. IC does not argue that Brown cannot bring his ADA claim in federal court because he previously brought a similar claim under some anti-discrimination clause of the CBA; rather, it argues that under the facts of this case, *the resolution of Brown's ADA claim itself* depends upon interpretation of the CBA. Therefore, *Gardner-Denver* is inapposite.[10]

We find *Buell* inapplicable for similar reasons. *Buell* held that the fact that an employee's injury which was otherwise compensable under FELA "was caused by conduct that might have been subject to arbitration under the RLA" did not deprive a Railroad employee of the right to bring a FELA claim for damages. *See* 480 U.S. at 564. Buell's FELA claim was a simple negligence claim which presumably required the court merely to analyze the facts regarding his employer's and his co-worker's conduct and to determine whether that conduct constituted actionable negligence under the standards established by FELA.[11] Like the claim

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[10] Moreover, we note that *Gardner-Denver* involved the relationship between mandatory arbitration provisions contained *in a CBA* and claims brought under federal statutes, and did not address the effect that the *RLA's* mandatory arbitration provisions have upon other federal claims. (Indeed, the CBA at issue in *Gardner-Denver* was not even governed by the RLA, since the employer was not a "carrier" under the RLA.) Thus, *Gardner-Denver* was not a true "preclusion" case at all, much less an RLA preclusion case, and its relevance to Brown's case appears even more remote.

[11] We note that Buell would not be barred from bringing this type of claim in court even under the standards established in the RLA

(continued...)

presented in *Gardner-Denver*, the resolution of Buell's claim did not require the interpretation of a CBA, and *Buell* is therefore of tenuous relevance to Brown's case. *Buell* addressed the narrow question of whether the mere fact that certain conduct might have been grieved through the arbitration machinery established by the RLA by itself precluded a plaintiff from bringing a claim under FELA. Answering this question in the negative, the Court stated that an injured worker should not be denied recovery under FELA "*simply because* he might also be able to process a narrow labor grievance under the RLA to a successful conclusion." *Id.* at 565 (emphasis supplied). Relying on *Gardner-Denver* and its progeny, the *Buell* Court rejected the Railroad's argument that the RLA's grievance machinery is the exclusive remedy for *any* of its employees' claims regarding workplace conditions. ("This Court has, on numerous occasions, declined to hold that individual employees are, *because of the availability of arbitration*, barred from bringing claims under federal statutes." *Id.* at 564 (citations omitted)). *Buell* therefore stands for the general and rather unremarkable proposition that the RLA does not automatically preclude all claims brought under independent federal statutes merely because the same conduct could be characterized as a violation of the CBA and grieved pursuant to the RLA. However, *Buell* does not hold that claims based on federal statutes which can themselves be conclusively resolved by interpretation of a CBA may be brought

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[11] (...continued)
preemption cases. "[P]urely factual questions about an employee's conduct or an employer's conduct and motives do not require a court to interpret any term of a collective-bargaining agreement," and are therefore not preempted by the RLA. *See Hawaiian Airlines*, 512 U.S. at 261 (citation and internal quotations omitted).

in federal court.[12]

Therefore, the language in *Gardner-Denver*, *Buell*, and their progeny stressing both the independence of federal statutory claims from CBA claims and the inability of CBA arbitrators to adjudicate federal statutory rights and to enforce federal statutory remedies must be understood in its proper context and should not be read to permit Brown's claim to go forward. The EEOC relies on this language to argue that claims brought by employees pursuant to federal statutes which create rights for individual workers are not precluded by the RLA, simply because they seek to enforce rights which exist independently of the CBA. We reject this argument for three reasons. First, we have already dismissed the argument in no uncertain terms. *See Monroe*, 115 F.3d at 518-20 (holding that the RLA precluded a claim brought under FELA because the resolution of the claim required interpretation of the CBA). In addition, as we have noted, the relevant precedents from the Supreme Court and the Courts of Appeals do not support the argument. Indeed,

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[12] Similarly, none of the ADA cases from other circuits on which the EEOC relies involve an ADA claim whose resolution depends upon interpretation of a CBA. *See Saridakis*, 166 F.3d at 1277 (holding that the RLA did not preclude a plaintiff airline employee from bring an ADA claim against his employer, where his asserted ADA right was independent of the CBA and thus could not be "conclusively resolved" by applying CBA standards, and where the resolution of the claim would require the court to "review the facts underlying [plaintiff]'s termination" as well as the employer's motives, but would not require an interpretation of the CBA); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1115 (8th Cir. 1995). *But see Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1034-35 (2d Cir. 1993) (applying *Gardner-Denver* and its progeny and holding that the RLA did not preclude the plaintiff's claim under the Rehabilitation Act even though it implicated portions of the CBA, reasoning that "absent the same rights and procedures provided in federal court, arbitration should not be the sole forum for final resolution of federal civil rights claims").

they consistently rule that claims brought under federal or state statutes which can be "conclusively resolved" by an interpretation of a CBA are not truly "independent" from the CBA, and are therefore precluded by the RLA. *See Hawaiian Airlines*, 512 U.S. at 257-63; *Lingle*, 486 U.S. at 407 (stating that the state law remedy at issue in that case was "independent" of the collective-bargaining agreement "in the sense of 'independent' that matters for [LMRA] § 301[13] pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement"); *Saridakis*, 166 F.3d at 1277 (stating that "as long as the . . . claim can be resolved without interpreting the [CBA] itself, the claim is 'independent' of the agreement") (quotation omitted). Finally, a bright-line rule that the RLA does not preclude claims brought under other federal statutes cannot be reconciled with the requirement that when conducting a preclusion inquiry a court must examine each federal statute to determine the effect that Congress intended the statutes to have upon each other. Thus, we decline to hold that the RLA's preclusive effect is determined in each case entirely by the source of the right asserted in the plaintiff's claim. It remains true *as a general rule* that the RLA will not bar a plaintiff from bringing a claim under an independent federal statute in court (because such claims are generally independent of the CBA and will be adjudicated under non-CBA standards). However, this rule no longer applies if the federal claim asserted by the plaintiff depends for its resolution on the interpretation of a CBA. Such claims are not "independent" of the CBA regardless of their source, and are therefore precluded by the RLA.

We close by stressing the limited scope of our holding. A claim brought under an independent federal statute is

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[13] In *Hawaiian Airlines*, the Court adopted *Lingle*'s standard for addressing LMRA preemption to resolve claims of RLA preemption. *See* 512 U.S. at 263. Thus, *Lingle* is directly on point.

precluded by the RLA only if it can be dispositively resolved through an interpretation of a CBA. This occurs "only when a provision of the collective bargaining agreement is the subject of the dispute or the dispute is substantially dependent upon an analysis of the terms of a collective bargaining agreement." *Loewen*, 65 F.3d at 1423 (citations omitted). Therefore, an employer cannot ensure the preclusion of a plaintiff's claim merely by asserting certain CBA-based defenses to what is essentially a non-CBA-based claim, *see id.*, or by arguing that the action challenged by the plaintiff is "arguably justified" by the terms of a CBA. *See Hawaiian Airlines*, 512 U.S. at 265-66. Nor will a claim be precluded merely because certain provisions of the CBA must be examined and weighed as a relevant but non-dispositive factor in deciding a claim or a defense. Therefore, Brown's claim would not have been precluded if either the parties did not dispute the interpretation of the relevant CBA provisions (and Brown had merely argued that he was entitled to a certain reasonable accommodation under the ADA *notwithstanding* anything to the contrary in the CBA),[14] or if the disputed provisions of the CBA were relevant but not dispositive of Brown's claim (as the CBA's provisions describing job functions are in relation to the ADA "essential function" determination). However, because in this case the interpretation of the CBA's seniority provisions could dispose of Brown's entire ADA claim as a matter of law, his claim is not truly "independent" of the CBA and is precluded by the RLA. Brown asserts that courts should allow ADA claims "to be judicially adjudicated in

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[14] Such arguments can succeed, because not all provisions of a CBA "are immune from limitation by the ADA duty to reasonably accommodate." *See Eckles*, 94 F.3d at 1052. Unfortunately for Brown, however, bona fide, collectively-bargained seniority systems which establish rights in other employees are "immune" in the sense that they cannot be subverted or superceded by any command of the ADA.

any instance where that can be done without doing actual violence to the competing statute." We agree. That is why an ADA claim should be permitted to go forward in all instances (even if the claim "tangentially touches" a CBA, or if a CBA claim based on the same facts has or is being arbitrated) unless, as here, it requires interpretation of a CBA which could conclusively resolve the claim. Abandoning this limitation and allowing Brown's claim to go forward would "do actual violence" to the RLA.

CONCLUSION

We have considered Brown's other arguments, and find them meritless. For the foregoing reasons, the district court's decision to dismiss Brown's claim for lack of subject-matter jurisdiction is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

2000 WL 420855
18 NDLR P 49
(Cite as: 2000 WL 420855 (N.D.Ill.))

United States District Court,
N.D. Illinois, Eastern Division.

Robert BROWN, Plaintiff,
v.
ILLINOIS CENTRAL RAILROAD COMPANY, Defendant.

No. 97 C 4836.

April 18, 2000.

MEMORANDUM OPINION

KOCORAS, J.

***1** This matter comes before the Court on Defendant's motion to dismiss for lack of subject matter jurisdiction. For the reasons set forth below, the Court grants Defendant's motion.

BACKGROUND

On July 9, 1997, Plaintiff Robert Brown ("Brown") filed a complaint alleging that Illinois Central Railroad Company ("Illinois Central") violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, *et seq.*, when it wrongfully placed him on medically disqualified status on or about June 13, 1996. It is undisputed that Brown suffers from a condition known as schizoaffective disorder. This dispute arises over whether Brown's condition

prevents him from working as a trainman for Illinois Central.

A. Illinois Central

Illinois Central is a "carrier" by rail as defined under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* (the "RLA"), and is headquartered in Chicago, Illinois, Illinois Central's operations are divided into several departments and most of its non-managerial employees are members of various unions. Each group of employees, or "craft," has its own separate identity, with its own collective bargaining agreements, work rules and seniority.

Illinois Central employees who work on the trains are part of the company's Transportation Department. The Transportation Department consists mainly of two groups of employees: engineers and trainmen. Illinois Central's trainmen craft is made up of two sub-classes: conductors and trainmen/brakemen/switchmen. (Because Brown's last position with Illinois Central was as a trainman/brakeman/switchman, and it is for this position that Brown asserts Illinois Central discriminated against him, our use of the term "trainman" refers to the trainman/brakeman/switchman position). A trainman's primary job duties require that he throw track switches, couple and uncouple cars, couple and uncouple hoses and engage and disengage brakes. Illinois Central's trainmen are represented by the United Transportation Union ("UTU"). The UTU has entered into a collective bargaining agreement (the "CBA") with Illinois Central on behalf of the trainmen.

Illinois Central has regularly established trainmen positions, as well as "guaranteed extra board" ("GEB")

trainmen positions. GEB trainmen are extra employees who are generally assigned to fill daily vacancies in the regularly established trainmen assignments. Such vacancies occur for any number of reasons, including illness, vacation or personal business. When an Illinois Central employee takes a day off, for any reason, he or she is said to "lay off" that day.

Prior to May 1995, Illinois Central had both yard and road GEB positions. Yard GEB jobs were limited to working within a prescribed geographical area known as a switching limit. In addition to this geographical limitation, yard jobs also had restrictions on employee starting times, which limited Illinois Central's flexibility in scheduling its employees. Yard GEBs had two assigned days off per week, while road GEBs had no assigned days off. In May 1995, Illinois Central abolished yard jobs and yard GEBs. Work previously performed by yard employees has since been performed by road GEBs (including Brown).

*2 Regularly established (non-GEB) trainmen have a specific work schedule and location. The regularly established trainmen jobs are six day per week positions. Trainmen with the most seniority at Illinois Central fill the regularly established, six day per week positions. GEB employees, on the other hand, do not have assigned days off. Since May 1995, when Illinois Central abolished yard jobs, Illinois Central has taken the position that GEB employees be available to work seven days a week, 24 hours a day (subject to the federal hours of service laws). Brown disputes whether a GEB employee is required to be available seven days a week, 24 hours a day.

GEB employees remain on GEB status for as long as they wish and continue to work whenever a trainman

position becomes available. Because Illinois Central has a strong incentive to have employees available to work on the trains, GEB employees are paid for each day they are on GEB status and are available to work, regardless of whether they actually work.

B. Plaintiff Robert Brown

Robert Brown began working for Illinois Central as a store clerk in October 1978. Brown transferred to the trainmen craft on or about May 11, 1979, which is his trainman seniority date. At all times relevant to this litigation, Brown ranked 216 th out of 226 trainmen on the seniority list. Only 10 trainmen had less seniority than Brown.

Sometime during the course of Brown's employment with Illinois Central, he was diagnosed by his personal physician as suffering from schizoaffective disorder, a condition that makes it harder for him to learn new concepts. Dr. Alexander Obolsky, one of Brown's treating physicians, testified that schizoaffective disorder can cause delusions, hallucinations, disorganized thinking, paranoia and social withdrawal, as well as making the individual dysfunctional and obsessive about normal events. Dr. Obolsky also testified that this condition can cause depressive episodes not experienced by individuals without the disorder. Brown was hospitalized in 1988 for his condition.

In November 1989, Dr. Vincent Indovina informed Illinois Central that due to Brown's condition and the added stress Brown felt when required to perform supervisory tasks, Illinois Central should limit Brown to working as a brakeman or switchman, rather than as

a conductor or foreman. Although the parties dispute whether Illinois Central immediately accommodated Brown's request, the parties agree that, since April 1993, Illinois Central has allowed Brown to work trainmen's jobs only.

When Illinois Central eliminated all yard jobs in May 1995, all trainmen positions became road service jobs. As noted above, the parties dispute whether, as a result of the elimination of yard jobs, the GEB employees for the trainmen position were required to work seven days a week. Regardless, because of his condition, Brown was unable to work seven days a week as a GEB trainman. For one full year, therefore, Brown "marked off," or failed to attend work, two days a week. Illinois Central claims Brown's absenteeism went undetected for this time period.

*3 In February 1996, John Kay became superintendent of Illinois Central's Northern Region, which includes the Chicago area. In May 1996, Kay examined the work histories of all trainmen within his district, including Brown. Kay thereafter met with Brown and several other GEB employees who Kay believed were not fulfilling their obligation to be available to work seven days per week. At a June 11, 1996 meeting, Brown gave Kay a note from Dr. Indovina stating that Brown should be limited to working a maximum of five days a week.

Kay forwarded Dr. Indovina's note to Hallie Burhoe, Illinois Central's Medical Director. Ms. Burhoe made certain internal inquiries to determine if any Illinois Central jobs existed that would accommodate both Brown's medical condition and his seniority. After she reviewed Brown's medical restriction, Ms. Burhoe consulted with Kay and Jack Gibbins, Illinois Central's

Director of Labor Relations, about the GEB trainmen job requirements and possible accommodations Illinois Central could reasonably make for Brown. After Illinois Central determined that it could not make reasonable accommodations for Brown, Ms. Burhoe informed Brown that Illinois Central would place him on its medically disqualified list. On or about June 13, 1996, Illinois Central medically disqualified Brown from employment. To date, Brown remains on Illinois Central's seniority list and may return to work if a position becomes available that accommodates both Brown's medical condition and his seniority.

C. Brown's EEOC Charge and Present Complaint

On June 19, 1996 and December 24, 1996, Brown filed timely charges of discrimination on the basis of his disability with the Equal Employment Opportunity Commission ("EEOC"). On April 18, 1997, the EEOC issued Brown a Notice of Right to Sue. On July 9, 1997, Brown timely filed his complaint in this matter, alleging Illinois Central violated the ADA when it placed him on its medically disqualified list. Illinois Central filed a motion for summary judgment, claiming (1) Brown cannot establish a *prima facie* ADA claim and (2) the accommodation proposed by Brown to continue his employ with Illinois Central is unreasonable. This Court denied Illinois Central's motion for summary judgment, finding that there existed genuine issues of material fact. Subsequently, Illinois Central filed, and the Court denied, a motion to reconsider this Court's denial of Illinois Central's motion for summary judgment. Illinois Central now moves to dismiss for lack of subject matter jurisdiction, arguing that the RLA preempts Brown's ADA

claims because they depend on an interpretation of the CBA. Before addressing the merits of Illinois Central's motion, the Court sets forth the legal standard that guides the analysis.

LEGAL STANDARD

Rule 12(b)(1) provides for dismissal of claims over which the federal court lacks subject matter jurisdiction. Jurisdiction is the "power to decide" and must be conferred upon the federal court. *See In re Chicago, Rock Island & Pacific R.R. Co.*, 794 F.2d 1182, 1188 (7th Cir. 1986). In reviewing a 12(b)(1) motion to dismiss, the court may look beyond the complaint and view any extraneous evidence submitted by the parties to determine whether subject matter jurisdiction exists. *See United Transp. Union v. Gateway Western Ry. Co.*, 78 F.3d 1208, 1210 (7th Cir.1996), *citing Bowyer v. United States Dep't of Air Force,* 875 F.2d 632, 635 (7th Cir.1989), *cert. denied,* 493 U.S. 1046, 110 S.Ct. 846, 107 L.Ed.2d 840 (1990). The plaintiff bears the burden of establishing that the jurisdictional requirements have been met. *See Kontos v. United States Dep't of Labor,* 826 F.2d 573, 576 (7th Cir.1987). When a party moves for dismissal pursuant to Rule 12(b)(1), the nonmoving party must support its allegations with competent proof of jurisdictional facts. *See Thomson v. Gaskill,* 315 U.S. 442, 446, 62 S.Ct. 673, 86 L.Ed. 951 (1942). With these principles in mind, the Court evaluates the Defendant's motion.

DISCUSSION

*4 Illinois Central contends that this Court lacks subject matter jurisdiction over Brown's ADA claims be-

cause they are preempted by the RLA. According to Illinois Central, because Brown's ADA claims require interpretation of the CBA, the RLA preempts Brown's claims. The Court agrees.

Two Seventh Circuit decisions guide this Court's analysis in this action: *Monroe v. Missouri Pacific Railroad Co.*, 115 F.3d 514 (7th Cir.1997), and *Coker v. Trans World Airlines, Inc.*, 165 F.3d 579 (7th Cir.1999). In *Monroe*, the Seventh Circuit found that the RLA preempted a claimant's federal FELA claim as well as his Illinois state law claim because they constituted "minor disputes" under the RLA, which fall under the exclusive jurisdiction of the RLA's Adjustment Board. *See Monroe*, 115 F.3d at 518. In *Coker*, the Seventh Circuit held that the RLA may preempt certain ERISA claims if they constitute "minor disputes" under the RLA. *See Coker*, 165 F.3d at 584. In *Coker*, however, the Seventh Circuit more explicitly addressed the approach that should be taken when a court considers the precedence of one federal statute over another. It explained that, when faced with the choice between two federal statutes, a court must analyze both to determine if they are incompatible or if they can be harmonized, and if they are incompatible to decide which one Congress meant to take precedence. *See id.* at 583-84. Because ERISA had language indicating that it was not meant to "alter, amend, modify, invalidate, impair, or supercede any law of the United States . . . or any rule or regulation issued under any such law," while the RLA was a comprehensive statute for labor dispute resolution, the court decided that the RLA's minor/major dichotomy controlled. *See id.* at 584, *quoting* 29 U.S.C. § 1144(d). Although it did not engage in this specific analysis in *Monroe*, the Seventh Circuit indicates in *Coker* that it

did make such a consideration in *Monroe*. *See id.* This Court thus assumes that in *Monroe* the Seventh Circuit determined that a more comprehensive RLA statute took precedence over FELA.

The Seventh Circuit, in *Coker*, having determined that the RLA took precedence over ERISA then engaged in determining whether the claimant's ERISA claim was a minor or major dispute. *See id.* Because the ERISA claim was a major dispute, the RLA did not preempt the ERISA claim in *Coker*. *See id.*

In the instant case, the Court is faced with a choice between the ADA and the RLA. Unlike in *Coker*, neither of these statutes contains language indicating that it should have less effect than the other. Rather both statutes are comprehensive—the ADA in eliminating discrimination against individuals with disabilities and the RLA in labor dispute resolution. "Absent a clearly expressed intention that Congress intended one federal statute to preempt another, a court must regard each as effective and give them simultaneous effect." *U.S. v. Palumbo Brothers, Inc.*, 145 F.3d 850, 865 (7th Cir. 1998). Moreover, courts are reluctant to find that one federal statute preempts another. *See id.* Because neither the ADA nor the RLA clearly expresses an intent to preempt the other, the Court, in this action, will read the ADA and RLA to coexist harmoniously. *But see Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 253, 114 S.Ct. 2239, 2244, 129 L.Ed.2d 203 (1994) (RLA preempts minor disputes based in state law).

***5** The ADA states that one of its purposes is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress

enacted the RLA, which governs collective bargaining agreements in the railway industry, to promote stability in labor-management relations by providing a comprehensive framework for labor dispute resolution. *See Hawaiian Airlines, Inc.,* 512 U.S. at 252, 114 S.Ct. at 2243, *citing Atchison, T. & S.F.R. Co. v. Buell,* 480 U.S. 557, 562, 107 S.Ct. 1410, 1414, 94 L .Ed.2d 563 (1987). Thus, the RLA provides a mandatory arbitral mechanism for the "prompt and orderly settlement" of two classes of disputes. *See Hawaiian Airlines, Inc.,* 512 U.S. at 252, 114 S.Ct. at 2244, *citing* 45 U.S.C. § 151a. Major disputes comprise the first class of disputes and involve the creation of contractual rights, while minor disputes form the second class of disputes and seek to enforce these contractual rights. *See Hawaiian Airlines, Inc.,* 512 U.S. at 253, 114 S.Ct. at 2244. While a claimant may sue immediately in federal court over a major dispute, the Adjustment Board under the RLA has exclusive jurisdiction over minor disputes. *See Coker,* 165 F.3d at 583, 584.

In harmonizing the ADA and the RLA, the Court finds the RLA's minor/major distinction useful and will employ it along with the Seventh Circuit's analysis in *Monroe* and *Coker* to determine which disputes must be brought exclusively under the RLA for arbitration. When ADA claims are independent of the CBA, the concerns of the ADA are at the forefront. Claims that are independent of the CBA are considered major disputes under the RLA and are not subject to the Adjustment Board's exclusive jurisdiction. *See Coker,* 165 F.3d at 583. Thus, ADA claims that are independent of the CBA such that they can be characterized as major disputes may be brought in federal court. However, when an ADA claim depends on an interpretation of the CBA, the RLA's

particular goal to regulate disputes that grow out of an interpretation or application of the CBA is prominent. Such claims that depend on and can be resolved by the CBA are considered minor disputes under the RLA and must submit exclusively to RLA mechanisms for adjudication. *See Monroe,* 115 F.3d at 516. Thus, should the Court deem Brown's ADA claims "minor disputes" within the meaning of the RLA, the RLA would preempt them, and the Court would lack subject matter jurisdiction over those claims.

Brown's ADA claims are "minor disputes." Minor disputes are those that grow "out of grievances, or out of the interpretation or application of [CBA's]." *Hawaiian Airlines, Inc.,* 512 U.S. at 253, 114 S.Ct. at 2244. The Seventh Circuit has found that a minor dispute arises when either a CBA provides the only source for a plaintiff's claim or when adjudication of a plaintiff's claim requires interpretation of a CBA. *See Monroe,* 115 F.3d at 519. Courts should categorize a dispute as minor "if it is even 'arguably justified' that the dispute turns on the application of the CBA." *Coker,* 165 F.3d at 583, *citing Hawaiian Airlines,* 512 U.S. at 265-66, 114 S.Ct. 2239. Illinois Central does not contend that the CBA provides the only source for Brown's claims; rather, Illinois Central argues that Brown's ADA claims require and may be resolved by an interpretation of the CBA.

***6** Brown, however, argues that his ADA claims do not depend on an interpretation of the CBA and are not minor disputes because his claims merely present questions of fact. "'Purely factual questions' about an employee's conduct or an employer's conduct and motives do not 'requir[e] a court to interpret any term of a collective-bargaining agreement.'" *Hawaiian Airlines, Inc.,* 512 U.S. at 261, 114 S.Ct. at 2248. Specifically, Brown

argues that the Court need not interpret the CBA in order to determine the essential functions of Brown's position or to determine the issue of reasonable accommodation. Nevertheless, Brown's claims are not purely factual questions, and they do require interpretation of the CBA. This is not a case where the meaning of a CBA is uncontested and only the facts that implicate it are unclear. *See id.; cf. Mason v. Norfolk Southern Corp.*, No. 97 C 3668, 1997 WL 733901 (N.D.Ill. Nov. 17, 1997) (where issues are factual ones relating simply to defendant's conduct and motivation and there is no evidence that CBA provides only source of rights and no evidence that adjudication of case would involve interpretation or application of CBA, there is no RLA preemption). Analysis of Brown's ADA claims necessarily requires interpretation of the CBA in order to determine the parameters of the reasonable accommodations Illinois Central is to provide. *Cf. Monroe,* 115 F.3d at 518.

At the heart of Brown's claim is whether the CBA will allow the reasonable accommodations Brown asserts Illinois Central should make. Although in some circumstances a CBA would not influence an employer's ability to make reasonable accommodations, under the facts of this case, the interpretation of the CBA is directly at issue. The CBA provides that an employee in Brown's position be available to work 7 days a week. Brown places this provision of the CBA at issue with several arguments. He claims that this provision does not indicate that being available 7 days a week is essential to his position. Moreover, Brown asserts that because he need only be "available" seven days a week, he arguably could fulfill the provision by actually working five days a week. Brown also suggests that he should be allowed to work six days a week under psychiatric monitoring or

that he should simply be allowed to "lay off" whenever his mental illness dictates. In order for the Court to determine whether Brown was not reasonably accommodated in his position, the Court must interpret the CBA in order to determine whether being available seven days a week is an essential function of Brown's position, and what being available seven days a week requires. Moreover, by allowing a reduction in the number of days, the CBA's provisions come into issue again because such a reduction may create a new position under the terms of the CBA, and the assignment of such a position may require interpretation of the seniority provisions.

As such, Brown's particular ADA claims involve interpretation of the CBA. Thus, they are minor disputes that may only be adjudicated under the RLA. *Cf. id.; Cain v. Union Pacific R.R. Co.,* No. 97 C 1443, 2000 WL 15099, at *2-3 (N.D.Ill. Jan. 5, 2000). Accordingly, the Court lacks subject matter jurisdiction over Brown's particular ADA claims.

CONCLUSION

*7 For the reasons set forth above, the Court grants Defendant Illinois Central's motion to dismiss for lack of subject matter jurisdiction.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Robert Brown — JUDGMENT IN A CIVIL CASE

v. — Case Number: 97 C 4836

Illinois Central Railroad Co.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that this cause is dismissed for lack of subject matter jurisdiction. Plaintiff to take nothing. All matters in controversy having been resolved, final judgment is entered in favor of the defendant and against plaintiff.

Michael W. Dobbins, Clerk of Court

/s/ Stephen C. Tokoph
Stephen C. Tokoph, Deputy Clerk

Date: 4/17/2000

Supreme Court, U.S.
FILED
NOV 13 2001
CLERK

No. 01-499

In The

Supreme Court of the United States

ROBERT BROWN,

Petitioner,

v.

ILLINOIS CENTRAL RAILROAD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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ARGUMENT

(1) The first question presented by this case is whether preclusion is warranted under the Railway Labor Act whenever a collective bargaining agreement ("CBA") might provide the employer with a defense to a statutory claim, or whether preclusion more narrowly is appropriate only where the right asserted by the plaintiff was itself created by the CBA.

Respondent appears to assert that these two very different standards are somehow the same. (Br. Opp. 14-15). The distinction between a cause of action and an affirmative defense is a fundamental one. Respondent's contention to the contrary is neither explained nor explicable.

The petition describes decisions in the Second, Eighth, Ninth and Tenth Circuits which limit preclusion to instances in which the CBA, not a federal statute, is the source of a plaintiff's rights. (Petition, pp. 9-13). Respondent asserts repeatedly that these decisions instead held that a statutory claim can proceed only "where there is no apparent dispute as to the interpretation of the CBA." (Br. Opp. 15-16). The actual holdings of these decisions, quoted in the petition, are to the contrary.

We noted in the petition that this Court's decision in *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994), contains not only several passages limiting preemption to cases in which the plaintiff's claim arose from the CBA itself (Petition p. 19 n. 20), but also other quite different sentences suggesting that preemption would apply, far more broadly, whenever any interpretation of a CBA might be required. (Petition p. 20 n. 21). Respondent quotes one of the latter passages to support its contention that the decision of the Seventh Circuit is consistent with the decisions of this Court. (R.Br. 9). Other portions of *Hawaiian Airlines*, however, could be, and regularly are, cited in lower court opinions which, unlike the Seventh Circuit, limit preclusion to cases in which the claim itself arises from a CBA. At this juncture in the development of

RLA jurisprudence, *Hawaiian Airlines* is not the solution, it is a principal source of the problem.

(2) We explained in the petition that under the decision of the court of appeals it would be virtually impossible to enforce the reasonable accommodation provisions of the Americans With Disabilities Act against an employer subject to the Railway Labor Act. (Petition, pp. 7-9, 20). This de facto exemption from the ADA includes not only the nation's airlines and railroads, but also a variety of other firms which service those industries and are thus subject to the RLA.[1]

The decision below is now applied in the Seventh Circuit to bar claims of intentional discrimination under other statutes. E.g., *Tice v. American Airlines, Inc.*, 2001 WL 1000723 (N.D.Ill. 2001) (*Brown* bars claim of intentional discrimination under the Age Discrimination in Employment Act.)

Respondent contends that under the Seventh Circuit decision there are several circumstances in which it still might be possible to bring an ADA accommodation claim. On even cursory inspection, however, it is clear that these possibilities are illusory.

First, Respondent asserts that the decision below would only bar ADA reasonable accommodation claims in those cases in which a plaintiff asserted that the accommodation in question would not violate a seniority system. (Br. Opp. 12). But in the Seventh Circuit every plaintiff *must* make just that assertion in light of *Eckles v. Consolidated Rail Corp.*, 94 F. 3d 1041 (7th Cir. 1996), or his or her claim will face dismissal.

Second, Respondent insists that an ADA accommodation claim will survive if an employer chooses to agree with a plaintiff's assertion that the accommodation will not violate seniority rules. (Br. Opp. 12). But the decision

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[1] See, e.g., *Sky Chefs, Inc.*, 15 NMB 397 (1988); *Sky Cap, Inc.*, 13 NMB 292 (1986); *International Total Services/Services & Systems, Ltd.*, 9 NMB 392 (1982).

of the Seventh Circuit assures that no employer will do so. Under the decision below an employer can always obtain dismissal of such an ADA claim simply by asserting a pro forma disagreement with the plaintiff's interpretation of the seniority rules. In the face of such a disagreement, the court is required to dismiss the ADA claim, without inquiring into the merits or good faith of the employer's position. Under the decision below it would be virtual malpractice for an employer's lawyer to fail to disagree with a plaintiff's interpretation of the seniority rules.

Third, Respondent insists that the decision below permits an ADA plaintiff to "sta[y] his ADA claim until he can establish his interpretation of a CBA in the appropriate arbitral forum." (Br. Opp. 13; see *id.* at 7). But Respondent does not dispute our contention that it is in fact impossible to obtain from the Public Law Board a determination of this sort. (Petition, pp. 5, 8-9). The Board can only resolve grievances arising under the CBA, not possible CBA-based defenses to lawsuits arising under federal statutes; in cases such as this the CBA is only the basis of a proffered defense, not of the claim itself. In this very case the Respondent persuaded the Board to refuse to resolve the instant controversy. (Respondent's Appendix, p. 6). Thus any stay of the sort proposed by Respondent would be permanent, preventing enforcement of the ADA as surely as would an outright dismissal.

(3) Respondent predicts that in *U.S. Airways, Inc. v. Barnett*, No. 00-1250, the Court will decide only whether a seniority system *not* contained in a CBA constitutes a defense to an ADA reasonable accommodation claim. (Br. Opp. 19-20). As we noted in our petition, however, both parties in *U.S. Airways* are advancing arguments which would be equally applicable to seniority rules contained in a CBA. (Petition, pp. 23-24). The reply brief recently filed by the petitioner in *U.S. Airways* continues to insist that the same legal standard should apply under the ADA regardless of whether or not the seniority system is

contained in a CBA, and the petitioner again expressly relies on the Seventh Circuit decision in *Eckles v. Consolidated Rail Corp.*, 94 F. 3d 1041 (7th Cir. 1996), which was applied by the court below in the instant case. (Reply Brief for Petitioner, No. 00-1250, pp. 17-20). *U.S. Airways* is scheduled for argument on December 4, 2001.

In the event that this Court's ultimate decision in *U.S. Airways* does not resolve this question, certiorari should be granted in the instant case to decide if a seniority rule contained in a CBA constitutes a bar to an ADA reasonable accommodation claim. The courts of appeals are not, as Respondent suggests, in agreement about the significance of such seniority rules. Decisions in several circuits, for example, will recognize such a defense only if the express terms of the CBA unambiguously bar the accommodation in question, a stringent standard not met here or in many other cases. E.g., *Willis v. Pacific Maritime Ass'n*, 244 F. 3d 675, 684 (9th Cir. 2001) (en banc); *Aka v. Washington Hosp. Center*, 156 F. 3d 1284, 1302 (D.C.Cir. 1998) (en banc).

Whether a CBA can exempt an employer from its otherwise mandatory obligations under the ADA is a matter of compelling importance; that issue should be determined by this Court in the instant case if the disposition of *U.S. Airways* leaves the matter unresolved. The EEOC construes its ADA regulations to provide that the terms of a CBA cannot alter an employer's statutory obligations.

> [A]n employer cannot avoid its responsibility to make reasonable accommodation subject to the undue hardship limitation through a contractual arrangement.

29 C.F.R. pt. 1630 App., Section 1630.6. The EEOC has insisted in the lower courts that seniority rules cannot create a defense to an ADA accommodation claim. The petitioner in *U.S. Airways* has emphasized that in that case "[t]he EEOC has not filed a brief in this Court . . .

defending its position below." (Reply Brief for Petitioner, No. 00-1250, p. 1). In litigation in this Court, however, the decision whether to defend a longstanding EEOC position on this (or any other) issue is made by the Solicitor General, not by the EEOC itself. If the EEOC's interpretation of the ADA is to be rejected, that should be on the basis of an informed decision by this Court, and should not occur simply because the Solicitor General in *U.S. Airways* opted not to present the Commission's construction of the law.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the decision of the Seventh Circuit.

Respectfully submitted,

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